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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/535,067	03/23/2000	Ronald O. Bubar	4645/31	1606

22859 7590 05/15/2006

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EXAMINER

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ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 05/15/2006

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/535,067
Filing Date: March 23, 2000
Appellant(s): BUBAR, RONALD O.

John Dolan
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/14/05 appealing from the Office action
mailed 7/21/04.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is substantially correct. A minor correction is the status of claim 15; claim 15 is rejected. The omission of claim 15 in the rejection statement in the final office action is a typographical error.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 12-13, 15-23, 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wallin et al.

Wallin et al disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked. (see col. 7 lines 22-48, col. 11 lines 26-30 and 64-68, col. 10 lines 1-2)

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Wallin et al do not disclose using margarine, having pizza topping on the laminated crust, pizza shape and baking the laminated dough.

It would have been obvious to one skilled in the art to use margarine instead of shortening because it is well known in the art to use shortening, butter or margarine alternatively. Butter and margarine are more expensive than shortening and give different taste and nutritional factor from shortening. It would have been obvious to one skilled in the art to select butter, margarine or shortening taking into consideration the above factors. As to applying pizza topping or forming a pizza, there is no identity standard to pizza because many types of topping are used to form pizza. For example, there are dessert pizza having fruit and cream. It would have been obvious to one skilled in the art to use a variety of filling to make different types of product. For example, it would have been obvious to use tomato and cheese filling if one wants to make a breakfast pizza. Such concept is well known in the art; for instance, there is breakfast burrito, breakfast taco etc.. There is also pizza pocket which has the same structure as the one disclosed by Wallin et al. Thus, it would have been obvious to make the Wallin product in any shape desired depending on type of product wanted. While Wallin et al teach to fry the product, baking and frying are well known alternative cooking methods. Frying gives a better texture but has the drawn back of increasing the fat content. It would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content. This alternative is known in the art; for example, there are potato chips that are fried and there are reduced-fat potato chip that are baked. The Wallin et al product also differs from the claimed

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product in the way it is made. However, determination of patentability in product-by-process claims is based on the product itself.

(10) Response to Argument

On page 6 of the appeal brief, appellant argues Wallin et al do not suggest utilizing anything other than vegetable oil based shortening as the fattening agent. While Wallin et al teach using shortening, there is no contradictory teaching of using other type of fat source. It is notoriously well known in baking to use shortening, butter and margarine interchangeably. The decision to use any of the well-known fats is based on several factors. Butter and margarine give better taste and flavor but they are more expensive than shortening and are not as stable. Shortening is cheaper and provides more shelf stability. Thus, the decision to use any of the well-known fats would have been an obvious matter of reference depending on which factor one deems more important. As evidence that it is well known to substitute shortening with margarine or butter or vice versa, the examiner submitted papers, in response to applicant's prior argument in the final office action, which teaches such substitution. For example, the Kitchen Tips teach to substitute shortening with margarine. The Crisco products teach that shortening can be substitute for butter or margarine. If shortening can be substituted for margarine or butter, it is obvious margarine can be used in place of shortening. While the Crisco paper does not have a date, the product has been around for a long time. The question of using shortening or butter or margarine is the one based on taste, texture and flavor versus expense and stability. The choice to be made is based on which factor is deemed more important. Appellant argues the use of

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shortening contributes to bready interior. The term "bready interior" is not a defined term because it is not known by Wallin or appellant what bready interior constitutes. There is no evidence established of record that shows unquestionably that bready interior cannot be obtained when margarine is used. Appellant makes reference to the declaration by Ronald Bubar filed on May 8, 2001. The declaration is not relevant to the issue at hand because it did not compare the claimed invention with that of Wallin et al. The Paulucci reference is no longer used in the rejection. Appellant argues Paulucci is relevant because it is similar to Wallin in the use of shortening. While shortening is used in both instances, the product structure of Wallin et al is different from Paulucci. The declaration states that the use of shortening in the Paulucci does not result in a laminated product having multi-layer of fat separating multiple layers of dough. The declaration does not show that using margarine instead of shortening will not result in a bready interior. The Wallin et al product is not the same as the Paulucci product because Wallin et al explicitly disclose the dough has multiple layers of fat separating between multiple layers of dough.

On page 7 of the appeal brief, appellant argues one skilled in the art would recognize that pizza does have an identity standard regarding topping as it is defined as "consisting of crust topped with tomato sauce and cheese, often garnished with anchovies, sausage slices, mushroom, bacon, olives etc." Even if this is the case, it does not preclude one skilled in the art from adding such toppings to the Wallin et al product because they teach any fillings can be added to the dough including pizza flavored filling (see col. 4 lines 5-6).

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On page 7, appellant argues Wallin et al desire a flaky exterior and bready interior and thus fry their pastry while in the claimed product, baking contributes to crispy structure and helps to provide a crust suitable for use in a microwavable pizza. It is recognized that baking and frying give different texture; no one can argue that baking and frying give the same end result. However, this difference does not take away the obviousness of substitute one method for another depending on the texture, flavor, taste, nutrition wanted. On page 8, appellant argues, the frying in Wallin et al give a greasy feel which is acceptable or even desired in a filled pastry product; however, such greasy fill is not desirable in baked laminated dough. Appellant's argument supports the fact why one skilled in the art would choose baking over frying; if one does not want a greasy filling in the product, it would have been obvious to bake it. Appellant argues the interchangeability of frying and baking is not a fact which is capable of instant and unquestionable demonstration as being "well known" in the art. The examiner respectfully disagree because the art of record shows that both baking and frying are known cooking method. For example, the Paulucci reference of record teaches both baking and frying as a cooking method. Appellant cites patent no. 4,170,659 as teaching frying and baking provide patentably distinct characteristics. No one will argue that baking and frying give the same characteristics. However, this difference does not take away the fact that such alternative is well known and would have been obvious to one skilled in the art. Some foods taste better when they are fried, but that does not mean that they cannot be baked. Thus, the choice between

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baking and frying is one that is based on taste, flavor, texture versus the fat content, calorie content and healthfulness.

On page 9 of the appeal brief, appellant argues Wallin et al proof the dough after the shortening lamination step; appellant states proofing the dough before lamination gives distinct and unexpected structural advantage over the prior art. This argument is not persuasive. Whether the dough is proofed before lamination or after lamination, the final product comprises proofed dough layers. Applicant's claims are directed at the product, not the process of making it. Appellant argues that proofing before lamination gives unexpected result; however, appellant does not have any showing of the claimed product over the Wallin et al product. The declaration appellant makes reference to is not a comparison between the claimed product and the Wallin et al product. Appellant states the declaration is on point because Paulucci is similar to Wallin in this aspect. The examiner respectfully disagrees because the structure and the product of Wallin is different from Paulucci; thus, one cannot make the same conclusion. Furthermore, the claims do not contain any limitation on characteristics that would distinguish it from the product of Wallin et al.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


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